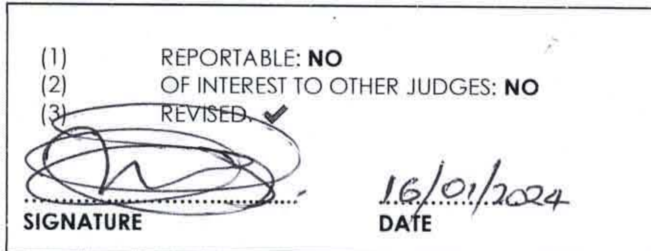
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **A216/2022**


(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

SIGNATURE DATE 16/01/2024

In the matter between

PINTO KAMA **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Thobane AJ *et* Munzhelele J

Heard on: 31 October 2023

Delivered: 16 January 2024 - This judgment was handed down electronically by circulation to the parties' representatives by mail, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 16 January 2024.

JUDGMENT

THOBANE AJ,

Introduction

[1] Mr. Pinto Kama (the appellant) was arraigned before the Regional Court, Pretoria, together with Trevor Tshepiso Mogale (accused 2), on the following counts;

Count 1: Housebreaking with intent to steal and theft;

Count 2: Housebreaking with intent to steal and theft;

Count 3: Contravention of section 5 of the Explosives Act, Act 26 of 1956, (possession of explosives), read with section 1, 2, 3(1) and 3(4) of the Explosives Act, Act 26 of 1956 and section 51(2)(a), Schedule 2 Part II of the Criminal Law Amendment Act, Act 105 of 1997.

[2] The appellant, who enjoyed legal representation throughout the trial in the Regional Magistrates Court, pleaded not guilty to all counts. To counts 1 and 2 the appellant denied that he broke into any house and further denied that he committed theft. To count 3, he denied that he possessed explosives and explained that the bag with explosives inside, which was found in the vehicle he drove, belonged to a third party who at the time of discovery of the bag, had left the vehicle momentarily to go to the shops.

[3] The appellant was nevertheless found guilty on all counts and sentenced as follows;

Count 1: 10 years' imprisonment;

Count 2: 10 years' imprisonment;

Count 3: 15 years' imprisonment, in terms of section 51(2)(a), Schedule II of Criminal Law Amendment Act[1].

In terms of section 280 of the Criminal Procedure Act[2], the court ordered all sentences to run concurrently. The court *a quo* further declared the accused unfit to possess a firearm.

[4] The appellant applied for leave to appeal both the conviction and sentence but was unsuccessful. The appeal against both conviction and sentence is before us pursuant to a successful bid at petitioning the Judge President of this Division.

[1] 105 of 1997.
[2] 51 of 1977.

[5] The transcribed record of proceedings was incomplete in this appeal. Counsel for the appellant submitted that reconstruction was impossible in that the magistrate who presided over the matter was deceased. Since reconstruction requires the involvement of the presiding officer as per case law, he submitted, it was impossible to achieve that in this matter. He further submitted that, absence of certain pieces of evidence, or testimonies from the record, which in counsel's view are significant, coupled with among others, the non-availability of appellant's co-accused to give supplementary direction, add to that the fact that the judgment of the court *a quo* is not elaborative on certain pieces of evidence, the conviction and sentence, falls to be set aside. The upshot of counsel's submission was that in circumstances where the record is inadequate, and there are no prospects of reconstruction, the appeal must be upheld. In which event, if the court so rules, the Prosecution can make a decision as to whether the matter ought to proceed *de novo* or not.

[6] Counsel for the respondent confirmed that the record was incomplete. He however was of the view that the appellant as well as the Clerk of the Court at Pretoria Magistrates Court, are both responsible for putting together a transcribed record before the court of appeal and for that reason, the appeal was not ripe for hearing. Both counsel indicated that in the event the court was disinclined to remove the matter, for want of a complete record, and be of the view that whatever was placed before court was adequate, they were prepared to make their respective submissions on both the conviction and the sentence. Counsel were given leave to place their respective cases or record. Firstly, they had to deal with the incomplete record then move on to the merits of the appeal. We advised that we will pronounce the court's view about the incomplete record in our judgment.

Facts

[7] The facts of this case are briefly as follows;

[7.1] On 18 to 21 April 2014, unknown persons broke into a house belonging to Cornelius Jacobus Joubert at or near Honeydew, in the Roodepoort area, which is within the area of jurisdiction of this court. At that time, Mr. Joubert was not home but was away on holiday. The gate motor as well as the front door were broken. Various household items were

stolen. In addition, a Toyota Hilux bakkie with registration letters and number VGT 276 GP was also stolen. The total value of the items that were stolen during the house breaking, including the vehicle, was approximately R312 250-00.

[7.2] On the same range of dates, namely, 18 to 21 April 2014, another house belonging to Mr. Jan Ulman du Plessis, also at Honeydew, was broken into. It is also within the area of jurisdiction of this court. Household items including electronic items were stolen together with an Audi 1.9 TDi with registration letters and numbers, PPW 589 GP. Another vehicle that was stolen is a Ford Eco Sport with registration letters and numbers CT 44 CF GP. The value of the stolen items was around R600 000-00.

[8] On 29 April 2014 at Marabastad in Pretoria, while two police officers, Sergeant Mogale and Constable Kekai, were on patrolling duty between 13h00 to 14h30, interest of one of them was drawn to a motor vehicle, a gold BMW, in which were two occupants. The driver as well as the front seat passenger were seen slouched over and looking at something that appeared to have been on the console situated between the two front seats. The appellant was the driver of the said motor vehicle. The two police officers, Sello Ambrose Mogale as well as Lesiba William Kekai cautiously approached the motor vehicle. Sgt. Mogale went to the driver's side and Constable Kekai to the front passenger's side. Upon reaching the vehicle, the policemen who were in police uniform, introduced themselves.

[9] The occupants of the vehicle were ordered out and permission was sought to conduct a search on their person and the vehicle. They consented and they were searched. In the pocket of the driver, the appellant, they found a Toyota motor vehicle key. In the pocket of accused 2, they found an Audi motor vehicle key. They proceeded to search the vehicle and on the door panel of the vehicle, on the driver's side, they found a motor vehicle license disk, of an Audi. They also found about five or six cellphones in the vehicle. In addition, they also found a backpack which was located between the front seats. They looked inside and saw green overalls, a balaclava, hand gloves as well as explosives. The explosives were later forensically examined and were found to be commercial explosives.

[10] The constitutional rights of the two occupants of the BMW were explained to them and they were thereafter handcuffed and placed under arrest. The police were thereafter taken to Pretoria West at Lotus Gardens where the appellant alleged he was residing. They had requested backup and were at that time in the company of more policemen. It turned out on arrival at the given address that the residence belonged to the appellant's ex-girlfriend and that the appellant was no longer residing there. They nevertheless searched the premises and they did not find anything.

[11] The appellant was asked about the Toyota motor vehicle key that was found in his possession as well as the Audi car license disk. He mentioned that the Audi was parked on Minaar Street in the Pretoria CBD and that the Toyota was parked in Centurion. They went to Minaar Street where they found the Audi parked. They pressed the key they found in the person of accused 2 and the vehicle responded. The vehicle had a registration number that did not correspond with the disk that was found in the BMW. They tested the VIN number and they were able to confirm that the Audi was reported stolen at Honeydew during a housebreaking and that a case had been opened.

[12] They then proceeded to Centurion where the appellant was residing. On arrival they tested the Toyota vehicle key found in the appellant's possession and a Toyota bakkie that was parked in a parking area, responded. They checked the VIN number of the said vehicle and they were able to confirm that the vehicle was reported stolen at Honeydew during a housebreaking and that there was a case opened. They also searched the place where the appellant was residing but they did not find anything incriminating.

Appellant's case

[13] The appellant gave the following summarized version;

> [13.1] That he was the driver of a BMW motor vehicle in the company of Trevor Mogale when they were approached by two policemen. The vehicle belonged to one Sello and at the time the police approached, Sello had momentarily alighted to go to the shops, at Marabastad.

[13.2] That they waited for Sello for some 15 minutes and when he did not arrive, he was then arrested and placed at the back of a police van.

[13.3] He disputed the version of the police to the effect that there was a bag in the BMW, inside which were explosives. What he knew was the presence of 5 cellphones, one of which belonged to Sello.

[13.4] After the arrest, police drove to a filling station and waited for backup. One policeman, who was part of the backup crew, said he knew him and knew where he stayed and the police drove to Lotus Gardens without him giving any directions to them. They drove to his ex-girlfriend's place and once there they searched her house. The police seemingly were looking for firearms however, none were found. Whilst there he was assaulted.

[13.5] They thereafter drove to the Pretoria CBD where he was left in the police vehicle for approximately 15 minutes. They, the police, on their own drove to his place of residence in Centurion where he was left in the vehicle for about 2 to 3 hours. He was asked to identify his apartment which was searched. He was thereafter taken to the police station.

[13.6] He denied that there was a bag with explosives that was found in the BMW belonging to Sello, of which he was the driver on the day. He was informed later that after he had been arrested another vehicle was found at the parking lot of the complex where he was residing. He was further informed that a Toyota bakkie that was found at the complex belonged to Sello. He denied that a Toyota key that could open that bakkie, which was found at the complex where he resided, was found in his possession.

The law

[14] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the SCA as follows in *S v Chabalala*[3];

> "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all

[3] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...."

[15] The aforementioned salutary approach was also adopted in *S v Trainor*[4]. In *S v Van der Meyden*[5], Nugent J, as he was then, made it clear that:

> "Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which could incriminate the accused, and evidence which exculpates him, cannot both be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the state evidence is so convincing and conclusive as to exclude a reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation."

[16] The conclusion which is arrived at by the court as to whether the evidence establishes the guilt of an accused person beyond reasonable doubt must account for all of the evidence. The Judge continued:[6]

> "The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

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[4] *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.
[5] *S v Van der Meyden* 1999 (2) SA 79 (W) at 449 B-E.
[6] *Ibid* at 448 A-C.

[17] In *S v Olawale*[7] at para 13 it was held:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[18] Finally, a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court,[8] and will only interfere where the trial court materially misdirected itself insofar as it's factual and credibility findings are concerned. In *S v Francis*[9] the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows

> "The powers of a Court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony".

Appellant's submissions

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[7] 2010 (1) All SA 451 (SCA).
[8] See *R v Dhlumayo and another* 1948 (2) SA 677 (A).
[9] *S v Francis* 1991 (1) SACR 198 (A) at 198J – 199G.

[19] Counsel submitted that the version of the appellant, about the arrest as well the fact that there was a third person present before they were confronted by the police, was not disproved by the State.

[20] Counsel submitted that the State failed to prove possession of the explosives beyond reasonable doubt in that there was a short time lapse from the time the police spotted the vehicle in which appellant was, to the time when the explosives were found. Further, that since on the State's version the explosives were wrapped, an inference cannot be made that appellant and accused 2 were aware that the bag contained explosives. Further, that since they were concealed by an overall and other items, it is not the only reasonable inference that the appellant knew what was in the bag. It is not possible, it is argued, that two people can possess one item, unless common purpose is proven. It was submitted that the State failed to mention that they were to rely on common purpose.

[21] It was further submitted by counsel that the learned magistrate erred in not applying the provisions of section 40 of the CPA. As a result, the search that was conducted on the BMW by the police was illegal. The evidence of the key of a Toyota therefore ought to be excluded.

[22] It is submitted further that the magistrate erred in the following respects;

- [22.1] In using the term, "wild goose chase";
- [22.2] In not holding a trial within a trial with regards to the pointing out as the appellant at that time was an accused person;
- [22.3] It is not the only reasonable inference that can be drawn, that the appellant broke in and stole the motor vehicles. It could be that other people were involved;
- [22.4] That the court wrongly applied the doctrine of recent possession to housebreaking. The fact that the items were found some 10 days later does not support the contention that appellant was involved in the initial crime;
- [22.5] The court erred in finding that a motor vehicle cannot be easily disposed of;

[22.6] It is submitted that the court could have considered conviction on section 36, being possession of suspected stolen goods;

[22.7] That the magistrate interfered during cross examination;

[22.8] That the guilt of the accused was not proven beyond reasonable doubt.

[23] On the sentences, counsel indicated that the sentences that were imposed were shockingly inappropriate and that the court paid lip service to the triad of sentencing. This despite the order of concurrency.

Respondent's submissions

[24] Counsel for the respondent submitted that the appellant was correctly convicted on all the counts. Further that the vehicles were found with information that the appellant and his co-accused gave to the police voluntarily. The car keys that were found as well as the car disk, corresponded with the two vehicles that were stolen during a housebreaking at Honeydew. The police simply followed on information, there was never a pointing out.

[25] In his view, the magistrate was correct in his finding that the two vehicles were assets or items that are not capable of quick disposal.

[26] On the sentence he was of the view that the sentencing court did not exercise its discretion wrongly nor did it misdirect itself or acted irregularly.

Analysis

[27] In his judgment, the magistrate summarizes briefly the evidence that was placed before him. Firstly, he deals with the charges that the accused before him were facing. Then he deals with the testimonies of the complainants in the two housebreaking counts. The next testimony he dealt with was that of an explosives expert Sergeant Charles Harvey, who had testified that he was called to Minaar Street where he saw a blue Audi, and a black bag nearby, which was provided to him. He examined the contents of the bag and found three explosives, blasting cartridges. He inspected them and found that they were commercial explosives. The police photographer who was present took photos thereof and the explosives were placed in a forensic bag which was there and then sealed and sent to the Forensic Science Laboratory.

[28] The two police officers who effected the arrests, Sergeant Mogale as well as Constable Kekai, gave their evidence. Their consolidated version is set out in the summary of the facts above and will not be repeated. Suffice to say the magistrate described the testimony of Sgt. Mogale as being a mirror image of the testimony of Constable Kekai.

[29] Before dealing in some detail with the points raised in the Notice of Appeal, the Heads of Argument as well as in argument before us, which I propose to set out concisely below, I must mention that the fact that an issue that was raised is not a topic on its own or is not mentioned in this judgment, does not mean that it was simply ignored. Secondly, there are many open gaps in the testimonies of the police as well those of the occupants of the BMW. The gaps are not evidence however, they are referred to so as to complete the picture.

The third person

[30] Appellant's version is that he is the one who was familiar with Sello (the third person) in that they stayed at the same complex in Centurion. Sello stayed at an apartment above his, but he did not know his surname. On that day, he requested a lift from Sello to go to town where he was going to meet Tshepiso Mogale (who shall be referred to as accused 2). It is not clear from the record when exactly appellant transitioned from a person who requested a lift, to a person who drove Sello's vehicle. The record simply reflects that the appellant was the driver and he confirmed that much.

[31] At Marabastad when the appellant and accused 2 were found in possession of 5 cellphones, one of those, on appellant's version, belonged to Sello. When the policemen alleged that the cellphones were stolen, an opportunity presented itself for appellant to tell the police that two of those were his, the other two belonged to accused 2 and most importantly, that one belonged to Sello who was also the owner of the BMW. Instead he told the police to verify ownership of the vehicle and said nothing of the cellphone. Another opportunity presented itself when they were waiting for the third person to return from shopping. Appellant's version is that they waited for 15 minutes. They had specifically said to him, on his own version, "let us talk". At no

time during the 15 minutes did he draw the policemen's attention to the fact that they now had in their possession, the third person's cellphone.

[32] Appellant testified that at Centurion where he stayed together with Sello albeit in separate apartments, they spent 2 to 3 hours. Due to the length of time spent there, there was a huge opportunity again to tell the police about the third person's residence. The appellant did not do so. When police came to obtain a statement the following day, on his version, it was then that he gave them the information. Even this version, that the police were informed about the residence of Sello, was not put to any of the witnesses, it only came out during cross examination.

[33] The trial court accepted the version of the two police officers who effected the arrests. The court further found that there was no revelation of the identity of the third person. Most importantly, the trial court found that it was a blatant lie[10]. In light of the above, the finding by the magistrate, that the third person does not exist, cannot be faulted when the entire evidence is taken into account.

Illegal search and the provisions of section 40 of the CPA

[34] Appellant argues that the mere fact that two people were seated in a vehicle looking at something, does not justify an assumption that a crime was being committed. It was submitted that the magistrate erred in not applying the principles set out in section 40 of the CPA. Therefore, the appeal court should find that the search was illegal, so would be with the discovery of the keys and the explosives.

[35] Section 40 of the CPA, sets out 17 instances or grounds upon which an arrest can be effected without a warrant. It reads *inter alia* as follows;

> "**40 Arrest by peace officer without warrant**
>
> (1) A peace officer may without warrant arrest any person-
>
> (a) who commits or attempts to commit any offence in his presence;
>
> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
>
> (c) who has escaped or who attempts to escape from lawful custody;

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[10] Page 349 paragraph 20.

(d) who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;
(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;
(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence..."

[36] The record shows that it was never disputed that the police, after the occupants of the BMW exited the vehicle, were asked for permission to conduct a search[11]. Sgt. Mogale testified that he requested the appellant to alight from the vehicle and asked for permission to conduct a search, to which request the appellant consented[12]. Similarly, Constable Kekai's testimony is to the effect that permission or consent was sought to conduct a search and given[13]. The belief that there was consent was actually never canvassed at all during both the policemen's cross examination. Which brings me to the aspect of reasonable suspicion.

[37] A lot of time and effort was directed at canvassing this issue with the arresting police officers by the counsel of the appellant. Infact the appellant's counsel was condescending in the extreme in his interaction with witnesses. I will return to this issue later. Section 40 gives a broad range of instances where an arrest can be carried out without a warrant. Clearly, there is a conflation of issues on the part the appellant. The arrest was preceded by a search without a warrant. The search would have been illegal if it was done outside the framework of section 22 of the CPA. In this instance it is not disputed that the search, which was warrantless, was legitimized by the consent of both the appellant and accused 2.

[38] Section 22 provides as follows;

"22 Circumstances in which article may be seized without search warrant

[11] Page 265 line 23
[12] Page 116 line 13
[13] Page 180 line 18 to page 181 line 4

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; ..."

[39] Section 20 which is referred to in section 22, reads as follows;

"**20 State may seize certain articles**

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[40] In the application for leave to appeal, the appellant lays the basis for the proposition that the search was improper. He locates it in "absence of reasonable suspicion" on the part of the police officials. The two police officials, who are attached to the K9 unit, were on patrol when their attention was drawn to the BMW. The description given is that the appellant and accused 2 were bent over and looking in the area of the console situated between the two front seats. What is important is that it was not disputed that they were positioned in that manner. What was disputed is what they were looking at. Whereas the police in their testimony indicated that they found a bag located in that area, the version of the appellant is that they were looking at a document. No document was found. The appellant testified that the police informed him that the area where the vehicle was parked was a spot where regularly drug transactions took place. If that were the case, then the police were justified in approaching the vehicle.

[41] It is not easy to decipher why the unlawfulness or otherwise of the search was raised for the first time in the application for leave to appeal. The record shows that at the trial the search was common cause. Which is why the argument that a trial

within a trial should have been held to determine admissibility, when it was common cause at the trial that the occupants of the BMW consented to the search, does not make sense. Other than the reasonable suspicion angle, appellant does not indicate the basis for holding a trial within a trial. It would have made sense if the contention was that the violation implicates or engages section 35(5) of the Constitution of the Republic of South Africa, 1996. The section provides that;

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[42] The fact that the evidence obtained warrantless incriminates the accused in the commission of the crime he is charged with, does not mean it is inadmissible. Since it is real evidence, its discovery is independent of the manner of its discovery. In *S v M*[14] the Supreme Court of Appeal dealt with the reliable nature of such evidence as follows:

> "Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see, for example, *R v Jacoy* (1988) 38 CRR 290 at 298) the reason being that it usually possesses an objective reliability. It does not 'conscript the accused against himself' in the manner of a confessional statement (*R v Holford* [2001] 1 NZLR 385 (CA) at 390)".

[43] In *Ndlovu and Others v S*[15] the full court said the following;

> "Accordingly, where the infringement results in the discovery of evidence which existed independently, and would have been discovered independently of the rights violation, the fairness of the trial will rarely be affected. By way of example, in *Gumede* a firearm was found in an unlawful search that violated the accused's right to privacy. The court found that the admission of the discovery of the firearm into evidence will not result in an unfair trial.
>
> > "The firearm was obtained by means of the search which, because of its illegality, violated the appellant's right to privacy. But the fact that the evidence of a firearm

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[14] *S v M 2002* (2) SACR 411 (SCA) at para [31].
[15] *Ndlovu and Others v S* (541/2019) [2020] ZAECGHC 131; [2021] 1 All SA 538 (ECG); 2021 (1). SACR 299 (ECG) (24 November 2020) at 37.

was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial." (at para [32]). (See also S v M 2002 (2) SACT 111 (SCA) at para [31]; Mthemba v S (2008) 3 ALL SA 159 (SCA) at para [33] and S v Lachman 2010 (2) SACR 52 (SCA))."

[44] The proposition that the search was unlawful fails for two reasons. Firstly, the appellant and accused 2 consented thereto. Secondly, even if the search was unlawful, since it yielded real evidence which could have been found independently, in terms of our law, it is not unlawful.

Possession of explosives

[45] The appellant contends that his version about what transpired during the arrest as well as his version about the presence of a third party before the police confronted them in the BMW, has not been disproved by the State. As a result, it is argued, the State failed to prove the possession of explosives beyond reasonable doubt. It is submitted among others, that since the explosives were wrapped and covered up with clothes among others, the inference that the appellant and accused 2 knew what was inside the bag ought to be rejected.

[46] There are glaring contradictions between the version of the appellant and that of accused 2, about the discovery of the explosives. Put differently, appellant placed before court two mutually destructive versions, one of which was consistent with that of accused 2. When the appellant pleaded at the commencement of the trial, he stated in his plea explanation that the bag that was found in the vehicle, belonged to the third person. When he testified in his own case, in chief, not once did he mention the bag. This is despite his legal representative questioning the two police officers at length about the bag. Even putting two different versions during the cross examination of Sgt. Mogale. He berated Sgt. Mogale for not listening when Constable Kekai asked

appellant where the owner of the explosives was. He castigated him for not reducing to writing the appellant's response to the effect that he had said at the scene, "he knew nothing about the explosives". Having done so, later in his examination he put the following statements to Mogale and Kekai respectively;

> *"Both accused, as far as I could gather, accused 2, will also say that the man got out of the car, to go and buy something and they both said: the person who left this bag here will be back....*
>
> *Both the accused say you found the bag on the back on the floor in the car. So, they do not deny that you found the bag there. They just say where you found it is not true."*

[47] The upshot of this is that at the trial the appellant ran with two defences. Firstly, that when confronted about the bag he stated that he knew nothing about it and secondly, that the third person left the bag in the vehicle when he went to the shops. There is however a third defence.

[48] During cross examination by the state, the appellant introduced a new version (the third defence so to speak). He testified that they were arrested at Marabastad and taken to the Engen Garage where other policemen joined them. It was only at the Engen Garage where he was confronted with certain items, among which he knew only his cellphones. The cross examination proceeded thus;

> "PROSECUTOR: You never saw a bag and keys that they spoke about?
>
> ACCUSED 1: I did not see such items when we were leaving Marabastad. That ... Such aspects were brought to my ears when they came and enquired about them to me. And I only said to them the only things that are mine are the phones.
>
> PROSECUTOR: The question is actually very simple. Did you ever see the keys and the bag that they spoke about?
>
> ACCUSED 1: I did not see.
>
> PROSECUTOR: Because when you pleaded to the charges it was placed on record with regards to the explosives that was in the bag your version would be that it was not your bag, but left there by someone else who alighted and gone to Marabastad.
>
> ACCUSED 1: That was the statement by the police, not mine.

PROSECUTOR: No, sir that was when you pleaded not guilty. The charges were put to you and was placed...[intervenes].

...

ACCUSED 1: Initially I indicated the reason why I am not guilty. Due to the fact that I know nothing about the allegations.

PROSECUTOR: I just want to put it to you sir, in your plea explanation you said the following, the explosives were found in the motor vehicle which was driven by you. Was not your bag, but left by someone else who alighted and gone to Marabastad.

ACCUSED 1: If I have mentioned that I believe I would have disclosed that in the statement."

PROSECUTOR: Is that your answer?

ACCUSED 1: Yes."

The third defence then, is that appellant does not know the bag and that the first time he saw it was at the Engen Garage.

[49] Counsel for appellant made a submission that since the explosives were wrapped and covered with overalls, therefore it cannot be inferred that the occupants of the BMW were aware that the bag contained explosive, as that is improbable. This submission is made in respect of one of the three of appellant's defences. All that this court needs to say is that that the explosives were wrapped, is not proof of lack of knowledge of what was in the bag. A further submission is that there was a short time lapse from the time the police spotted the BMW to the time they eventually confronted the occupants thereof, for them (appellant and accused 2), to have known what was inside the bag. The issues of time lapse were never canvassed with any of the witnesses. The appellant having raised in his defence three different mutually destructive defences, firstly submitting that there was a short time lapse from the time they were spotted by the police, to the time they were confronted, secondly, that even if they looked inside the bag they may not have seen the explosives, should be the last person to submit that that the charge that he possessed explosions was not proven. Courts caution against this. *"It is unacceptable that any possibility, no matter how farfetched, should be elevated to a defence in law"*[16]. The trial court accepted the version of Sgt. Mogale and Constable Kekai about the discovery of the explosives.

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[16] *Komane v S* (51/2019) [2022] ZASCA 55 (20 April 2022).

Given also the varying and contradictory nature of the version of the appellant, we find no misdirection with the finding of the trial court.

Assault and pointing out

[50] When Sgt. Mogale was cross examined by the legal representative of the appellant, it was put to him that at Lotus Gardens a tall white policeman throttled the appellant until he passed out. Sgt. Mogale disputed the assault. One of the shocking things that was allowed to happen at the trial is that appellant's Attorney, Mr. De Meyer, put it to a witness that he had overheard a discussion between accused 2 and his advocate. He then proceeded to place on record what he overheard to the witness thus breaching attorney client privilege, namely, that he heard accused 2 say appellant was assaulted but he, accused 2 was not. It did not end there, he put a version that he was informed by his client, appellant, that he was told by accused 2 that he was suffocated with a plastic bag over his head. He, hastily added that it may be a lie. When Mr. De Meyer cross examined Kekai, he also traversed the assault of the appellant at the hand of the tall white man whom he said grabbed appellant by his throat and pulled him around. In one stride he managed to violate attorney and client privilege as well as the rule against admissibility of hearsay evidence.

[51] Appellant testified that at Lotus Gardens after the police searched the house, they came to him and asked him about firearms. When he responded that he did not have any, they started to assault him. He did not say by who or how he was assaulted. The assault was of course denied by the State witnesses. Other than the say so of appellant the record does not show that anything was done about the assault.

[52] Counsel for the appellant argues that the discovery of the vehicles, was as a result of the assault and that consequently, the discovery was inadmissible. The evidence however should not be approached in piecemeal fashion. Courts are warned about such an approach. In *S v Hadebe and Others*[17], Marais JA, had occasion to repeat what had previously been said by him in *Moshephi and Others v R* 1980-1984 LAC 57 at 59F- H, namely that:

[17] *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at para 13.

"The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[53] The chronology below places the issue of "pointing out" in better perspective. The police searched the BMW driven by the appellant and found two sets of keys, a car registration disc as well as a bag with explosives inside. Appellant informed the police that he stays at Lotus Gardens and accused 2 told them he is from North West. They called for backup and went to Lotus Gardens. They however discovered that the appellant was no longer staying there and that the property belonged to his ex-girlfriend. After searching the property, with her consent, and finding nothing, Sgt. Mogola asked appellant (this was not disputed), that since two sets of keys were found, where were the vehicles? Appellant informed them that the Audi was in the City Centre on Minaar Street and that the Toyota bakkie at Centurion. They traveled to Minaar Street where the Audi was parked. On locating it, Kekai pressed the key and the Audi responded. They checked the VIN number whether it was positive and they were able to confirm that it had a case number in Honeydew. They proceeded to Centurion where the appellant was residing. He showed them his residence and the bakkie. Mogale tested the key by pressing it and the vehicle responded. They proceeded to test its VIN and were able to confirm that it had a case number in Honeydew.

[54] When regard is had to the record, what seems to have started out as an assault to compel the production of firearms, led to the discovery of two motor vehicles. The appellant devoted one sentence to the assault in his testimony; *"They said I was lying, they started assaulting me"*. He gave no details. The version put to Sgt. Mogale is that appellant was throttled until he passed out. Nothing is said as to what happened

next. The version put to Constable Kekai is that appellant was grabbed by his throat and pulled around. Again nothing further is said about what happened next. The warning sounded in *S v Reddy*[18] must be heeded, namely,

> 'In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.'

[55] When one considers the conspectus of the whole evidence starting with the discovery of two sets of keys on the person of the appellant and accused 2 and a motor vehicle licensing disk on the door panel of the BMW, it is clear that the vehicles would have been discovered independent of the infringement of the appellant's rights.[19] There are three versions of the assault, namely; that a tall white policeman throttled the appellant until he passed out; that a tall white policeman grabbed appellant's throat and pulled him around as well as the version of the appellant that '*they*' assaulted him. I observe without deciding, that given the different versions of the assault it is open to serious doubt. Most importantly however there is no nexus between the assault, if it occurred, and the discovery of the two motor vehicles in that the alleged assault on appellant's own version, was directed at coercing him to disclose the whereabouts of firearms. As stated above, the assault is denied. Adding to the fact that there are three versions of it, it makes it subject to some serious doubt. The contention that the vehicles were discovered as a result of the assault is without merit as it was not even put to any of the state witnesses.

Possession of the motor vehicles

[56] It is argued that the magistrate erred in not applying the basic principle regarding possession. It is not quite clear what this basic principle is but in the heads of argument it is said that two people cannot possess one item at the same time. This argument is made in relation to the bag with explosives, which I have dealt with above. In so far as the vehicles are concerned the following needs be said. If accused 2 was

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[18] *S v Reddy and Others* 1996 (2) SACR 1 (A) at para 20.

[19] See *S v M* supra.

from North West and was only in Pretoria for purposes of paying for a car he purchased, why would he be found in possession of a key of a vehicle that was parked in Pretoria and whose disk was on the door panel of the car he was a passenger in? Similarly, why would the appellant be in possession of keys of a vehicle parked in the complex where he stayed? Why would a disc of a motor vehicle whose key was found in possession of accused 2 be found in the door panel of a vehicle which the appellant was driving?

[57] The appellant was a witness who always adjusted his evidence, causing the magistrate to caution him because he could hear the language he was testifying in. One such occasion was when he testified in chief about showing the police (my emphasis) where the Toyota bakkie was parked. The record reflects the following;

> *"MR DE MEYER: Now this chap who was in the car with you says there with you, did he have a vehicle at your premises?*
> *ACCUSED 1: There was a vehicle, the one that we were using on that day and also another vehicle that was found in the premises.*
> *MR DE MEYER: Where was it found? Or before you say it. What does it look like there at those premises where you stay? Are there parking lots or what?*
> *ACCUSED 1: It is a complex which have garages and private parkings for visitors.*
> *MR DE MEYER: And this vehicle that was found there by them, where was this place?*
> *ACCUSED 1: From here…the distance would be from here to the toilet, there is parking.*
> …
> …
>
> *MR DE MEYER: What kind of vehicle was it?*
> *ACCUSED 1: They told me the following day when they came to obtain a statement they informed me that they found a Toyota there yesterday.*

[58] When the appellant was at first asked about where the Toyota bakkie was found, he stated that it was found at a parking lot and he also gave an estimate of the distance. During cross examination he evaded the question whether Sello had a

bakkie parked at the complex. His response was that police asked around at the complex and they were given a response. He stated that he knew about the bakkie on the day of his arrest when the police took him to his apartment to conduct a search. When asked if he ever saw Sello in the bakkie he stated that he never did. The prosecutor was relentless. The appellant stated further that after his release on bail he made enquiries at the complex and that is when he was informed that Sello was using the bakkie. He testified that after he was released on bail he informed the police outside the courtroom that the bakkie belonged to Sello, three months after he had been in custody.

[59] Knowledge about the bakkie is a matter that appellant struggled to explain. At first, he testified that he knew about the bakkie the following day when the police came to obtain a statement from him. Then he testified during cross examination that he learnt about the bakkie two days after he was released on bail. His release on bail was three months after his arrest. Lost to him in all this is the fact that a key that was found in his possession was used to open a motor vehicle which he alleges, he was able to ascertain, belonged to Sello. The same Sello whose vehicle was found in his possession and the same Sello who left a bag with explosives at the back of the BMW. Whenever an explanation is sought from the appellant, it is Sello who must explain and of course Sello is nowhere to be found.

[60] While agreeing with the magistrate in his observation and exposition of the law, that theft was a continuous offence, counsel differed with him on the doctrine of recent possession arguing that the magistrate wrongly applied the doctrine to housebreaking. The rule that theft is a continuing crime, simply put, means that the theft continues to be committed as long as the stolen property remains in the possession of the thief or somebody who has participated in the theft or somebody who acts on behalf of such a person. The rule has two important legs. The first is procedural in nature with regards to territorial jurisdiction. This means the accused may be tried and convicted in a different jurisdiction than the one in which the crime was committed. The second leg of the rule is that since our law draws no distinction between perpetrators and accessories after the fact and given that theft is a continuous crime, a person who

assists the thief after commission of the theft, is not an accessory after the fact but is guilty of theft because the theft is still continuing[20].

[61] The crimes committed in this instance are two counts of housebreaking with intent to steal and theft and one of unlawful possession of explosives. Putting aside the count of unlawful possession of explosives as it is not germane to the doctrine of recent possession, what we know is that the vehicles that were recovered were stolen during housebreakings in Honeydew.

[62] The Supreme Court of Appeal in *Mothwa v The State, (supra)*, recently restated the law as it pertains to the proper application of the doctrine. The following summary can be extracted therefrom;

[62.1] The doctrine permits the court to make an inference that the possessor had knowledge that the property was obtained in the commission of an offence and also infer that the possessor was a party to the initial offence;

[62.2] The court ought to be satisfied that;

(a) the accused was found in possession of the stolen property;

(b) the item was recently stolen.

[62.3] When considering the drawing of an inference, the court must have regard to, *inter alia;* the lapse of time between the crime and the possession, the rareness of the property, the ease with which it can pass hands;

[62.4] There is no steadfast rule about what constitutes recent. Each case is treated on its own merits;

[62.5] The doctrine should not be used to absolve the state of the onus of proof, which rests upon it;

[62.6] What is required of the accused, who has been found in possession of property that has been recently stolen, is to give a reasonable explanation for the possession.

[63] In this matter the state, in my view, has been able to discharge the onus that rests upon it, for the state has proved that;

[20] *Mothwa v The State* (124/15) [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (1 October 2015) at [8] to [10].

[63.1] the appellant was found in possession of an item;

[63.2] the item was stolen;

[63.3] 10 days had lapsed between the theft and the discovery of the stolen items;

[63.4] in the circumstances of this case, the recovery was after the crime had been recently committed. There is no evidence as to when the Ford Sports Eco was disposed of. All that is there is that it was recovered months later. It could have been recovered months later whereas it was disposed of the day before its recovery. The recovery of the Ford does not necessarily support the proposition that it was easily disposed unless if it is within the knowledge of the appellant when the disposal took place;

[63.4] most importantly, the appellant failed to give a reasonable explanation. The version of the appellant is not reasonably possibly true and the magistrate was correct in accepting the evidence of state witnesses, thereby rejecting that of the appellant.

Wild goose chase

[64] Mr. Bouwer, counsel for the appellant, took issue with the fact that the magistrate in his judgment said; "...he first led them on a wild chase, quiet a good chase, as he took them first to Lotus Gardens. Then to Minaar where the Audi was found...... He further took them to Centurion where the Toyota keys........" and again, "It was a wild goose chase. Because nothing was won (sic) at Lotus Garden". As I understand the context, the State's case is that after the appellant was arrested and asked about his residence, he gave the police the address of Lotus Gardens while knowing very well that he was no longer residing in that address and that in fact the lady who stays there, is his ex-girlfriend. This was not in any way disputed. The trip to Lotus Gardens was a fruitless one, fitting perfectly with the idiom the magistrate used. We find no misdirection or error in the usage by the magistrate of the idiom when making a point that the trip was pointless. Whether it is a complaint or a ground of appeal, it is without merit.

Sentence

[65] In the heads of argument counsel for the appellant states that all sentences were ordered to run concurrently with the sentence imposed in count 1, meaning the effective sentence would be 10 years. That however is incorrect. The effective term of imprisonment is 15 years in that the highest sentence imposed is 15 years. The order handed down is that all the sentences are to run concurrently.

[66] The magistrate is said to have simply paid lip service to the triad as set out in S *v Zinn*[21]. It is not elaborated why it is contended that the triad was paid lip service to, however the sentence is said to be grossly inappropriate and severe notwithstanding the order of concurrency. It is further submitted that there was no basis to find that these were workings of a syndicate and that the perpetrators were not amateurs. This against the backdrop of the magistrate having found that, because three motor vehicles were stolen, you needed to have at least three drivers.

[67] The magistrate is criticized for a remark or an observation that he made that the country is bedeviled by CIT robberies where commercial explosives mostly are utilized. The magistrate went on to say that people who possess these explosives are serious criminals. On both fronts the magistrate's observations are correct. There's nothing wrong with taking judicial notice in the manner that the magistrate did.

[68] Without more, it is submitted that the minimum sentence, in respect of the possession of explosives count, that of 15 years for a first offender, is disproportionate to the crime and that the court should deviate therefrom. No submission is made as to the reasons for deviation other than that the factors advanced, cumulatively viewed should result in a deviation.

[69] The following personal circumstances which were meant to mitigate were advanced;

[69.1] the appellant had no previous convictions;

[69.2] he was 38 years of age;

[69.3] was a first offender;

[21] S v Zinn 1969 (2) SA 537 (A).

[69.4] was married with two children and a wife all of whom he supported back home in Zambia as well as extended family;

[69.5] he was employed and contributed to the economy.

[70] The task of imposing an appropriate sentence is the discretion of the trial court. A court of appeal may only interfere if the sentence imposed is shockingly inappropriate. In *S v Rabie*[22], it was held:

> "In every appeal against the sentence, whether imposed by the magistrate or a Judge, the Court hearing the appeal: - (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is vitiated by irregularity or by misdirection or is disturbingly inappropriate."

[71] Corbett JA further said that a judicial officer should not approach punishment in a spirit of anger, because that will make it difficult for him to achieve the delicate balance between the crime, the criminal and the interests of society, which his task and the objects of punishment demand. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. A judge should not flinch from firmness, where firmness is called for, but he should approach his task with a humane and compassionate understanding of human frailties.

[72] In *S v Malgas*[23], it was held:

> "The courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances... The court is obliged to take into account all relevant factors as it retains its discretion when passing a sentence."

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[22] *S v Rabie* 1975 (4) SA 855 (A) at headnote.
[23] *S v Malgas* 2001 (1) SACR 469 (SCA) flynote.

[73] Other than pleading his personal circumstances, there is nothing peculiar about their circumstances, nothing extraordinary or exceptional, even when viewed cumulatively.

[74] In *S v Vilakazi*[24], the court held:

> "In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in an employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

[75] When looking at the unique circumstances of this case, the interest of society, the crime and the personal circumstances of the appellant as well as the aggravating nature of the case, add to that the salutary principle that a court of appeal should not interfere with a court's exercise of discretion, I am of the view, that the aggravating circumstances far outweigh the mitigating factors and most importantly, that the appellant has failed to discharge the onus to show exceptional circumstances. The prescribed minimum sentence of 15 years for a first offender is a fitting sentence. The magistrate was correct in imposing the sentences that he did.

Reprimand

[76] I will be remiss if I did not comment about the manner in which the trial was conducted. In the heads of argument, it is argued that the appellant was denied a fair trial in that the magistrate interfered with cross examination. The magistrate allowed the trial to at times escape his control. He also made unnecessary remarks. The prosecutor equally does not escape criticism. To tell a witness upon requesting an adjournment that perhaps he will comeback wiser is degrading. The harshest criticism should be reserved for the legal representative of the appellant. He humiliated witnesses and did not treat them with respect. He interrupted witnesses when they were responding to questions he posed to them. He at times gave evidence without posing any question. Making long statements full of ridicule. He made snide remarks

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[24] (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)

some directed at the magistrate. He referred to a witness who was yet to testify as a liar and a dangerous man. Saying to a magistrate if you interrupt again, I am going to cross examine you is unbecoming of an officer of the court, even as a joke, which the practitioner claimed it was. It is hoped that if this judgment does reach all of them, they will have an opportunity to reflect and acknowledge that these antics were not their finest hour.

[77] Having heard the submissions before us and having gone through the record of the proceedings, I am unable to conclude that the factual findings as well as the credibility findings by the trial court are demonstrably wrong as to justify interference therewith. In my view, the record proves that the trial court was correct in its findings. Given the conspectus of the evidence, I am unable to find that the trial court erred in finding that the appellant's version is so inherently improbable as not to be reasonably possibly true. It follows that the appeal must fail.

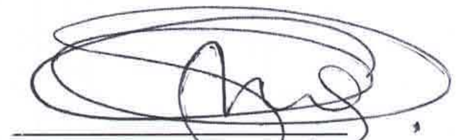
[78] As a result the following order is made;

[78.1] Condonation for proceeding on the incomplete transcribed record is granted;

[78.2] The appeal against conviction is dismissed;

[78.3] The appeal against sentence is dismissed.

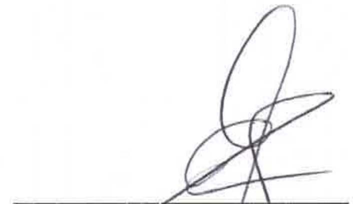
[78.4] Both the conviction and sentence are confirmed.



THOBANE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.



pp . **MUNZHELELE**

JUDGE OF THE HIGH COURT

Date of Hearing: 31 October 2023
Date of Judgment: 16 January 2024

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